FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

No. 31

I. C. SUTTON HANDLE FACTORY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

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The opinion herein of the United States Court of Appeals for the Eighth Circuit is not yet reported; a copy of the opinion is appended hereto and marked Exhibit A.

Decision was rendered by the Court of Appeals for the Eighth Circuit on June 11, 1958, and entered on July 2, 1958.

Petition for rehearing was denied on July 28, 1958.

An order was entered by the Court of Appeals for the Eighth Circuit on August 7, 1958, granting petitioner thirty (30) days from July 28, 1958, in which to file a petition for writ of certiorari and the record in the Supreme Court of the United States, staying the requirement of petitioner's compliance with direction of the National Labor Relations

Board during such period, and providing further that such stay should continue until the final disposition of the case by the Supreme Court of the United States if within said thirty days period there be filed with the National Labor Relations Board a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed.

The statutory provision believed to confer jurisdiction in the Supreme Court of the United States is 62 Statutes 928, Title 28, Section 1254, Federal Code Annotated, which reads in part: "Cases in the Courts of Appeals by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree: * * *"

The question presented for review is: In affirming an order by the National Labor Relations Board directing reinstatement of an employee alleged and found by the Board to have been discharged because of union activities, is the Court of Appeals at liberty to disregard the uncontradicted evidence of the employer that the employee was discharged for cause?

The Court of Appeals reviewed and affirmed an order of the National Labor Relations Board which, in part, directed petitioner to re-instate as his employee one Joe Hulsey. This order resulted from proceedings instituted before the Board against petitioner by United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Local Union 2746, under the Labor Management Relations Act.

This employee was discharged on October 24, 1956, for the employer's stated reason that Hulsey was visiting and wasting time on the job (Record, p. 15, Testimony of I. C. Sutton). Petitioner had no knowledge of union activities

in his plant until so advised by the union representative, Mr. Mowery, on October 26, 1956, two days after the discharge of Hulsey (Record, pp. 14-15, Testimony of I. C. Sutton).

From April to October 26, 1956, certain of the employees had quietly carried on union organizational work in petitioner's plant (Testimony of Joe Hulsey, Record, p. 13). Pursuant to a representative petition filed October 29, 1956, by United Brotherhood of Carpenters and Joiners of America, Local Union 2746 (hereinafter called "charging party"), a consent election was held in petitioner's plant in Harrison, Arkansas, January 8, 1957. This election resulted in a tie vote except for the challenged ballot of Joe Hulsey (Stipulation No. 1, Record p. 3). Joe Hulsey's vote was challenged by petitioner as being cast by a man who was no longer his employee. The charging party alleged in its complaint with which this case was initiated that Hulsey had been illegally discharged because of his membership in and activities on behalf of the union (Complaint, Record, p. 3). Following a hearing, the Board's referee found that Hulsey was illegally discharged because of union activity (Referee's Intermediate Report, Record, pp. 30-37). This finding was adopted by the Board (Decision and Order of the National Labor Relations Board, Record, p. 19). Petitioner's request to have this order set aside was denied by the United States Court of Appeals for the Eighth Circuit (Opinion, Exhibit A herein). In that opinion, the Court of Appeals wrote and held: "The Board, as the trier of the facts, was not compelled to accept at its face value the testimony of the petitioner, a highly interested witness, even though it was uncontradicted."

The Court of Appeals committed error in holding that the Board does not have to accept at face value the uncon-

tradicted testimony of an employer that he had discharged an employee for cause because such holding is contrary to the provisions of the Administrative Procedures Act, 5 U.S.C.A., Section 1001, *et seq.* (the applicable portion of which act is appended hereto and marked Exhibit B), and contrary to the holding of the Supreme Court of the United States in the case of *Universal Camera Corporation v. N.L.R.B.*, 71 S. Ct. 456, requiring that in arriving at the substantiality of evidence, the trier of facts must consider the whole record.

It was urged before the Court of Appeals that there is no substantial evidence to support the Board's order nor the findings on which it is based. This position was taken from the first when petitioner made objection to this effect to the Intermediate Report of the Board's Referee (Record, p. 42).

The referee dismissed petitioner's explanation for the discharge as being not worthy of belief. He assigned and expounded two reasons for his holding:

(1) Petitioner discharged Hulsey without warning despite the facts that Hulsey had worked for three and one-half years without any complaint having been made to him about his work (Examiner's Report, Record, p. 33), and,

(2) Petitioner made statements to other employees subsequent to the discharge that he had fired Hulsey "for wasting time while trying to form a union". (Examiner's Report, Record, p. 33).

Neither of these reasons can stand as a matter of law.

As to the first, it is sufficient to note that the Board is not authorized to substitute its judgment for that of the employer as to what is sufficient cause for discharge.

N.L.R.B. v. Williamson-Dickie Mfg. Co., (C.C.A. 5) 130 F2d 260, 264; 56 C.J.S. 245, Section 28(66)b.

As to the second, these statements cannot be considered legally sufficient as impeachment of the employer's credibility of testimony by him that he was ignorant of the employee's union activities at the time of the discharge because: (1) The statements, being susceptible of contrary inferences, establish neither one inference nor the other (*Bussman Mfg. Co.* v. *N.L.R.B.*, (C.C.A. 8) 11 F2d 783, 786-7) and (2) If these statements, although apparently contradictory to petitioner's testimony, can be reconciled with that testimony, then they cannot be held to be contradictory and thus be regarded as impeaching his credibility. 98 C.J.S., p. 558, Sec. 583.

That the Court of Appeals for the Eighth Circuit is familiar with these elementary legal principles cannot be doubted when we read that Court's language in *American Smelting and Refining Co.* v. *N.L.R.B.*, (C.C.A. 8) 126 F.2d 680: "* * * But it remains true that the discharger knows the real cause of discharge; it is a fact to which he may swear. If he says it was not union membership or activity, but something else which in fact existed as a ground, his oath cannot be disregarded because of suspicion that he may be lying. There must be impeachment of him, or substantial contradiction, or if circumstances raise doubts, they must be inconsistent with the positive sworn evidence on the exact point."

But disregarding this previous announcement, the Court of Appeals wrote in the instant case, "We are satis-

fied that, from the circumstances surrounding Hulsey's discharge, the Board reasonably could infer that his separation from his employment just as the crucial stage in the campaign of the union to organize the petitioner's plant had been reached, was the proximate result of his union activities."

One of the "circumstances" surrounding Hulsey's discharge is reflected in Sutton's testimony that Hulsey was discharged for wasting time. As a matter of law, Sutton's credibility has not been destroyed, nor has his testimony been substantially contradicted. His explanation together with evidence in confirmation of that explanation are still part of this record. And as long as it is, can it be held that the Board has discharged its burden of proof to establish by substantial evidence that Hulsey was discharged because of union activity?

Petitioner therefore prays the Supreme Court of the United States that this petition be granted; that a writ of certiorari be issued herein to the Court of Appeals for the Eighth Circuit; and that upon final hearing hereof, judgment be entered reversing the holding of the Court of Appeals for the Eighth Circuit, and directing that Court to make findings of fact in keeping with the law.

Respectfully submitted,

/s/ ROBERT W. CUMMINS,
P. O. Box 744,
Harrison, Arkansas,
Attorney for Petitioner.

I, Robert W. Cummins, attorney for Petitioner, after being duly sworn, upon my oath do certify that I have on

this August 16, 1958, by certified air mail, sent a copy of this petition for writ of certiorari to the following:

National Labor Relations Board, Washington, D. C.;
Frederick U. Reel, attorney of record for the National Labor Relations Board, Washington, D. C.;
The Solicitor General, Department of Justice, Washington 25, D. C.

/s/ Robert W. Cummins.

Subscribed and sworn to before me this August 16, 1958.

/s/ Len Jones,

(Seal) Notary Public, Boone County, Arkansas.